

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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JUN 25 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Implementation of the Local Competition )  
Provisions of the Telecommunications )  
Act of 1996 )  
)  
Joint Petition of BellSouth, SBC, and )  
Verizon for Elimination of Mandatory )  
Unbundling of High-Capacity Loops )  
and Dedicated Transport )

CC Docket No. 96-98

REPLY COMMENTS OF  
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**REPLY COMMENTS OF  
EL PASO NETWORKS, LLC**

El Paso Networks, LLC (“EPN”), pursuant to the Public Notice issued April 23, 2001,<sup>1</sup> files these reply comments in opposition to the Petition of BellSouth, SBC, and Verizon (together, “RBOC Petitioners”) for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport (“Petition”).

**I. The Comments Overwhelmingly Demonstrate that the Petition Should Be Summarily Rejected**

The overwhelming majority of commenters, including two incumbent local exchange carriers (“ILECs”), Sprint and Qwest, oppose the Petition. Only the United States Telecom Association (“USTA”) recommends that the FCC should conditionally grant the Petition, subject to a “safety valve” that would permit competitive local exchange carriers (“CLECs”) to show, on a market-by-market basis, that they would be impaired without access to unbundled high capacity loops and dedicated transport. Like the Petition, USTA’s proposal is unsupportable and should be rejected.

As initial comments show, the Petition is procedurally improper and premature and should be summarily dismissed. EPN objects to the time and expense it has incurred in responding to a facially defective pleading. However, even if the Petition had met the FCC's procedural requirements, it would have to be denied because its factual and legal analyses are flawed.<sup>2</sup> The so-called "Fact Report" on which the Petition relies is riddled with errors and misstates important facts<sup>3</sup> that have been contradicted by the evidence submitted in initial comments.<sup>4</sup> EPN provided perhaps the starkest example of the consequences of granting the Petition in that CLECs would be unable to serve customers in California because they are effectively barred in that state from constructing alternative facilities.<sup>5</sup>

Moreover, USTA erroneously claims that the Petition shows high capacity loops and dedicated transport fail to meet the impair test "*as interpreted by the United States Supreme Court.*"<sup>6</sup> USTA applies the wrong test. Although FCC rules implementing the statutory impair test and requiring ILECs to unbundle high capacity loops and dedicated transport are pending on appeal before the United States Court of Appeals for the District of Columbia Circuit, they are nevertheless effective and binding law. As Qwest argues, the appeal of the *UNE Remand*

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<sup>1</sup> *Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, DA 01-1041 (rel. April 23, 2001).

<sup>2</sup> EPN stresses that the FCC's triennial review process established in the *UNE Remand Order* does not in anyway suggest that high capacity loops and transport should be removed from the national list of UNEs as part of that process. In fact, EPN is confident that CLECs at that time will continue to be impaired in their ability to provide competitive services without unbundled access to high capacity loops and transport.

<sup>3</sup> See, e.g., Mpower Comments, Ankum Declaration; WorldCom Comments, Attachment A; XO Communications Burns Declaration at ¶ 8.

<sup>4</sup> See e.g. Covad Declaration at ¶¶ 13-18; McLeod Comments at 2-3; Network Plus Korner Declaration at ¶ 8; TDS Comments at 7; New York State Department of Public Service Comments at 2-4; WorldCom Comments at 7-8. See also Oliver Declaration (attached as Exhibit B).

<sup>5</sup> EPN Comments at 16-17.

<sup>6</sup> USTA Comments at 1 (emphasis added). See also USTA Comments at 6, 9.

*Order*,<sup>7</sup> not this proceeding, is the proper forum for USTA and RBOC Petitioners to dispute whether the FCC's impair test and the *UNE Remand Order's* list of elements that must be unbundled are consistent with Section 251(d)(2).<sup>8</sup> Measuring the evidence in this proceeding against the FCC's test shows that CLECs would be impaired in their ability to provide *local services* without access to unbundled high capacity loops and dedicated transport nationwide because alternatives are not ubiquitously available.<sup>9</sup> Because initial comments demonstrate that the Petition is without merit, the FCC should promptly reject it.

## II. USTA's Safety Valve Proposal Must Be Rejected

USTA recommends that the FCC grant the Petition but also adopt a "safety valve:"

USTA supports a process that would ensure that *any* CLEC has the opportunity to demonstrate in a *specific* local exchange market that high-capacity loops and/or dedicated transport are not available and that the CLEC would be impaired in its ability to serve that local exchange market if these facilities are not provided by the ILEC as UNEs. When a CLEC believes that mandatory unbundling of high-capacity loops and/or dedicated transport facilities is *necessary* in order to compete, the requesting *CLEC must bear the burden* of demonstrating to the Commission that in a *specific* local exchange market served by the CLEC the absence of mandatory unbundling of the ILEC's high-capacity loops and dedicated transport facilities would impair the CLEC's ability to provide competitive local exchange service.<sup>10</sup>

As with the Petition, USTA's "safety valve" proposal is totally without merit and merely another attempt to divert CLEC resources from competing in local exchange markets to defending their rights in needless litigation. The FCC may summarily reject the USTA proposal on the

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<sup>7</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), review pending sub nom. *United States Telecom Ass'n et al. v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir.).

<sup>8</sup> Qwest Comments at 1.

<sup>9</sup> See e.g. AES Comments, Exhibit A (using special access could increase AES' costs by 150% to 750%); WorldCom Fleming Declaration at ¶ 8 (cost of bringing a new building on net averages \$250,000 per building); TDS Comments at 5 (laying fiber in TDS' markets can cost up to \$150,000 per mile).

very good grounds that it has considered and rejected it twice before. The FCC twice determined that a case-by-case evaluation of unbundled network elements (“UNEs”) would be inconsistent with the requirements of the Communications Act of 1934, as amended (“Act”), and unworkable. In the 1996 *Local Competition Order*, the FCC found that:

A national list [of UNEs] would: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing requesting carrier’s business plans; (3) facilitate the states’ ability to conduct arbitrations; and (4) reduce the likelihood of litigation regarding the requirements of Section 251(c)(3).<sup>11</sup>

In 1999, the FCC affirmed its finding that a national UNE list best meets the requirements of the Act<sup>12</sup> and rejected calls for a national impair test to be applied by state commissions on a state-by-state basis:

the resources and time that requesting carriers would be required to devote to individual regulatory proceedings designed to determine if the bright-line criteria had been met in every market would delay the introduction of competition. The outcomes of each proceeding would likely vary across the country, thereby making it more difficult for competing carriers to execute reasonably uniform national or regional business plans.<sup>13</sup>

USTA’s offer to work with the FCC to develop an expeditious test does not save the proposal from its inherent flaws. USTA has presented no evidence showing that its proposal addresses the FCC’s very real concerns.

A state-by-state, market-by-market application of the impair test would impose an undue and unworkable administrative burden on the FCC, the states and the industry<sup>14</sup> and would stop

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<sup>10</sup> USTA Comments at 7 (emphasis added).

<sup>11</sup> *UNE Remand Order* at ¶ 117 (citing conclusions of 1996 Local Competition First Report and Order) (citations omitted).

<sup>12</sup> *UNE Remand Order* at ¶ 120.

<sup>13</sup> *UNE Remand Order* at ¶ 129.

<sup>14</sup> *UNE Remand Order* at ¶ 142.

or materially delay the introduction and expansion of competition in local markets. EPN is providing service in three Texas markets and plans to enter two other Texas markets in the near future.<sup>15</sup> EPN has spent considerable investment dollars and devoted considerable personnel resources to establish collocation arrangements that would be rendered largely worthless if the FCC were to grant the Petition, even subject to USTA's safety valve. EPN uses UNEs to provide service to its largely wholesale customers who in turn incorporate EPN's services in the products they provide end users.<sup>16</sup> Although EPN may not use high capacity loops to serve each and every customer, it nevertheless depends on ILEC dedicated transport to connect loops terminating in its collocation arrangements to EPN's network. Neither RBOC Petitioners nor USTA address whether they would have the FCC immediately deny EPN's access to all high capacity loops and dedicated transport. Suddenly denying access to these UNEs could force EPN to discontinue existing services to its customers (and its customers' customers) who, not surprisingly, would likely have to turn to the ILEC to resume service. In order to maintain existing services, EPN would be forced to purchase an alternative to UNEs which, not surprisingly, would likely be the ILEC's special access service. Either way, ILECs would receive a substantial financial benefit from the immediate cut-off of CLEC access to unbundled high capacity loops and dedicated transport, which undoubtedly is their intent in filing the Petition.

Even if EPN could continue using its existing UNEs during the market-by-market litigation that would be required under the USTA proposal, devoting resources to such litigation would necessarily take resources away from turning up new customers and completing EPN's

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<sup>15</sup> EPN Comments at 2.

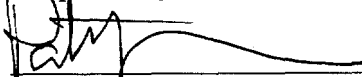
<sup>16</sup> EPN is a prime example of the potential problems with the FCC's 35% statistic. If EPN orders an unbundled loop from the ILEC and provides that loop on a wholesale basis to another CLEC, that CLEC may report its service as being provided over a non-ILEC loop, when, in fact, the CLEC is using an ILEC loop.

entry in its two planned, and partially completed, markets. Similarly, since ILECs would presumably oppose such litigation, ILEC resources would also be diverted unproductively from providing service to their customers, both retail and wholesale. In short, USTA's proposal suffers from the same flaws that led to the FCC's rejection of a market-by-market unbundling test and the adoption of a national UNE list. USTA's proposal is contrary to the goals of the Act and should be rejected.

### **III. Conclusion**

Under effective and binding law, ILECs are required to provide CLECs unbundled access to high capacity loops and dedicated transport throughout the country. In initial comments, parties, including two ILECs, submitted evidence that confirms that alternatives to ILEC high capacity loops and dedicated transport are not available as a practical, economical, and operational matter. There is no reason for the FCC to reverse the very same rules it is defending on appeal. Requiring CLECs to prove that their ability to provide service in each local exchange market in the country would be impaired without access to unbundled high capacity loops or dedicated transport would thwart competition in contravention of the goals of the 1996 Act. The FCC should promptly reject both the Petition and USTA's safety valve proposal.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply Comments of El Paso Networks LLC have been served via Hand Delivery\* or First Class Mail to the persons on the attached list.

A handwritten signature in cursive script, appearing to read "CM Pharr", written in black ink.

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Candise M. Pharr

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